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April 19,2007

COPY ORIGINAL

VIA FEDEX

Ms. Marlene **H.** Dortch
Secretary
Office of **the** Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, Maryland **20743**

Re: **Initial Comments in Response to the Further Notice of Proposed Rulemaking in MB Docket No. 05-311**

Dear Ms. Dortch:

Attached for filing *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992,* MB Docket No. 05-311, are an original and four (4) copies **of** the Initial Comments of the Burnsville/Eagan Telecommunications Commission; the City **of** Minneapolis, Minnesota; the North Metro Telecommunications Commission; **the** North Suburban Communications Commission; the City of Renton, Washington; and the **South** Washington County Telecommunications Commission in Response to the Further Notice of Proposed Rulemaking (the "Comments").

I have also enclosed an additional copy of the Comments. Please date-stamp that copy and return it to me in the enclosed postage-prepaid envelope.

Very truly yours,

BRADLEY & GUZZETTA, LLC

Stephen J. Guzzetta

Attachments

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† Also admitted in Wisconsin
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Before the
FEDERAL COMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket **No.** 05-311

INITIAL COMMENTS OF THE BURNSVILLE/EAGAN TELECOMMUNICATIONS COMMISSION; THE CITY OF MINNEAPOLIS, MINNESOTA; THE NORTH METRO TELECOMMUNICATIONS COMMISSION; THE NORTH SUBURBAN COMMUNICATIONS COMMISSION; THE CITY OF RENTON, WASHINGTON; AND THE SOUTH WASHINGTON COUNTY TELECOMMUNICATIONS COMMISSION IN RESPONSE TO THE FURTHER NOTICE OF PROPOSED RULEMAKING

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April 19,2007

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SUMMARY

The municipalities and joint powers commissions filing these comments (collectively, the "LFAs") represent 26 cities and townships, in Minnesota and Washington, with a combined population of over 800,000. The LFAs assert that the ***Report and Order*** adopted by the Federal Communications Commission (the "FCC" or the "Commission") on March **5,2007,** along with the rules, findings and pronouncements contained therein, are illegal, arbitrary and capricious, and unnecessary. The LFAs therefore urge the Commission not to extend the various rules and findings set forth in the ***Report and Order*** to incumbent cable operators at any time, including franchise renewal.

Because the ***Report and Order*** has been challenged by numerous entities, the LFAs believe that it would be premature to apply the ***Report and Order's*** rules to incumbent cable operators until all appeals have been resolved and the rules have been upheld. If the ***Report and Order*** is applied to incumbent cable operators at renewal, and the FCC's rules are ultimately found to be unlawful, as the LFAs believe, there will be mass confusion among all parties as to what steps can and should be taken, and local franchising authorities will have suffered irreparable harm by agreeing to long-term franchise renewal agreements that are predicated on illegal rules, findings and pronouncements.

The LFAs also wish to make clear that the FCC's rulings, if applied to incumbent cable operators at renewal, would be inconsistent with the plain language and intent of § 626 of the Communications Act of 1934, **as** amended (the "Communications Act"), 47 U.S.C. § 546. Congress has already crafted clear formal and informal processes for dealing with franchise renewal applications. The FCC's franchise application process is therefore unnecessary. Moreover, the FCC's rulings would conflict with § 626 in several respects. For instance, the

deadlines in the ***Report and Order*** are inconsistent with the 4-month deadline in § 626(c)(1) of the Communications Act, 47 U.S.C. § 546(c)(1), and Congress' open-ended timeframe for conducting and competing the needs assessment and past performance review set forth in § 626(a)(1), 47 U.S.C. § 546(a)(1). Moreover, the franchise renewal process in the Communications Act is designed to ensure that local cable-related needs and interests will be satisfied, while the FCC's franchise application process permits applicants to establish their own franchise terms and conditions, regardless of whether they meet community cable-related needs and interests.

Contrary to the Commission's concerns, build-out requirements should not be an issue at franchise renewal. This is because build-out provisions included in franchise agreements negotiated pursuant to the informal renewal process have been voluntarily agreed to by both parties, and are therefore ***per se*** reasonable. To the extent than an incumbent cable operator's cable system has not already been completely built out in accordance with its existing franchise, or if necessary to meet articulated needs and interests, the formal renewal process permits local franchising authorities to establish build-out requirements that an incumbent cable operator must meet (taking cost into consideration). If an incumbent cable operator believes such requirements are unreasonable, it can avail itself of the protections in § 626 of the Communications Act. No FCC action is required or permitted.

The Commission's determinations concerning franchise fees are troubling and should not **apply** to incumbent cable operators in several instances. Specifically, PEG access and institutional network obligations that are included in agreements outside of a franchise agreement arc not, and should not be, subject to the federal franchise fee cap. This is also true with respect

to in-kind contributions and institutional network commitments paid for by local franchising authorities.

Finally, the LFAs express their strong support for the FCC's tentative conclusion that it cannot preempt local authority to unilaterally adopt or agree to customer service standards that exceed FCC standards or address matters that are not addressed by the FCC's minimum standards. The preservation of local authority in § 632(d)(2) of the Communications Act, 47 U.S.C. § 552(d)(2), is unambiguous and bars any Commission action to preempt or limit local consumer protection authority.

Before the
FEDERAL COMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	)))))	MB Docket No. 05-311

INITIAL COMMENTS OF THE BURNSVILLE/EAGAN TELECOMMUNICATIONS COMMISSION; THE CITY OF MINNEAPOLIS, MINNESOTA; THE NORTH METRO TELECOMMUNICATIONS COMMISSION; THE NORTH SUBURBAN COMMUNICATIONS COMMISSION; THE CITY OF RENTON, WASHINGTON; AND THE SOUTH WASHINGTON COUNTY TELECOMMUNICATIONS COMMISSION IN RESPONSE TO THE FURTHER NOTICE OF PROPOSED RULEMAKING

I. INTRODUCTION.

These comments are filed on behalf of the City of Minneapolis, Minnesota, the City of Renton, Washington and the following municipal joint powers commissions in the above-captioned proceeding: the Burnsville/Eagan Telecommunications Commission (a municipal joint powers commission consisting of the cities of Burnsville and Eagan, Minnesota); the North Metro Telecommunications Commission (a municipal joint powers commission consisting of the cities of Blaine, Centerville, Circle Pines, Ham Lake, Lexington, Lino Lakes and Spring Lake Park, Minnesota); the North Suburban Communications Commission (a municipal joint powers commission consisting of the cities of Arden Hills, Falcon Heights, Lauderdale, Little Canada, Mounds View, New Brighton, North Oaks, Roseville, St. Anthony and Shoreview, Minnesota); and the South Washington County Telecommunications Commission (a municipal joint powers commission consisting of **the** municipalities of Woodbury, Cottage Grove, Newport, Grey Cloud

Island Township and St. Paul Park, Minnesota) (collectively, the "LFAs").[1] The LFAs represent twenty-six cities and townships in Minnesota and Washington, with a combined population of over 800.000.

The LFAs are generally responsible for administering and enforcing their local cable franchises. The LFAs also receive and resolve consumer complaints regarding cable service and cable modem service. In addition, the LFAs are empowered to negotiate renewal cable television franchises and to conduct franchise renewal proceedings. Under applicable state law, the City of Minneapolis, Minnesota, the City of Renton, Washington, and the South Washington County Telecommunications Commission are authorized to approve or deny renewal franchise proposals and to award renewal cable franchises authorizing the use of public rights-of-way.

All of the LFAs operate video production facilities, and are actively involved in producing government access programming and/or making studios, edit suites and equipment available for public access programming. These operations are supported by financial and in-kind support from the incumbent cable operator. Additionally, several of the LFAs oversee and/or operate institutional networks which connect government facilities, including schools, and are utilized for advanced video, voice and data applications. Thus, the LFAs have a significant interest in cable system franchising, including franchise renewals, the provision and ongoing use of institutional networks and continued financial and in-kind support for governmental, educational and public access, and would be directly affected by any action the Federal

[1] With the exception of the South Washington County Telecommunications Commission, the member cities of the various joint powers commissions award cable franchises to applicants. The joint powers commissions are generally responsible for enforcing and administering their member cities' cable franchises. The South Washington County Telecommunications Commission, however, is also empowered to award cable franchises on behalf of its member cities

Communications Commission (the "Commission" or the "FCC") might take pursuant to its March 5, 2007, Further Notice of Proposed Rulemaking ("*FNPRM*").[2]

As a preliminary matter, the LFAs wish to make clear that they oppose the extension of the various findings, pronouncements and rules set forth in the *Report and Order* to incumbent cable operators at any time, including (but not limited to) franchise renewal. This is because, among other things, the *Report and Order* is specifically based on the FCC's interpretation and application of Section 621(a)(1) of the Communications Act of **1934,** as amended (the "Communications Act"), **47** U.S.C. § **541(a)(1)**, which states that local franchising authorities cannot unreasonably refuse to award an *additional competitive franchise*. That provision does not apply to cable operators that already possess a franchise (and are seeking to renew that franchise) because they are not by definition new entrants. Indeed, incumbent providers are already providing service to subscribers and have developed a significant embedded customer base, which means the competitive market entry rationale for the FCC's rules and findings do not apply to incumbent cable operators. Thus, there is no legal or policy basis for extending the various findings, pronouncements and rules in the *Report and Order* to incumbent cable operators.

In addition, it is the LFAs' position that the entire *Report and Order* is unlawful and invalid insofar as it exceeds the FCC's statutory authority, is arbitrary and capricious, an abuse of discretion, unsupported by substantial evidence, in violation of the United States Constitution, including, without limitation, the Fifth and Tenth Amendments, and is otherwise contrary to law.

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[2] *In the Matter of'lmplernentation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992,* Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. **05-311** (Rel. March 5, 2007). The FCC's Report and Order, which sets forth findings and rules for competitive cable service providers, is referred to in these comments as the *"Report and Order."*

Accordingly, the FCC's rules, findings and pronouncements cannot and should not be applied to cable operators with existing franchise agreements (or, for that matter, new entrants). Because the ***Report and Order*** has been appealed by several entities, the FCC should refrain from taking any action in the ***FNPRM*** until the appeals process has been completed.

Although the LFAs assert that the ***Report and Order,*** and the rules, findings and pronouncements contained therein, are illegal and unnecessary, they will, **for** the sake of argument, address the FCC's tentative conclusion that the ***Report and Order*** "should apply to cable operators that have existing franchise agreements as they negotiate the renewal of those agreements . . ."[3] As indicated above, the ***Report and Order*** cannot apply to incumbent cable operators because § 621(a)(1) of the Communications Act, 47 U.S.C. § 541(a)(1), only addresses additional competitive franchises and does not govern the renewal of existing franchise agreements. Franchise renewals are instead governed by Section 626 of the Communications Act, 47 U.S.C. § 546, and applicable state and local laws. It is also important to note that the FCC's stated purposes for adopting the ***Report and Order*** – enhancing cable competition and accelerating broadband deployment[4] – are unrelated to incumbent cable operators since they have already deployed their networks and are offering cable, telephone and broadband services. Thus, as previously mentioned, there is no legitimate rationale for extending the rules, findings and pronouncements in the ***Report and Order*** to incumbent cable operators.

The LFAs do, however, strongly support the FCC's tentative conclusion that the FCC "cannot preempt state or local customer service laws that exceed the Commission's standards" or "prevent LFAs and cable operators from agreeing to more stringent standards."[5] Section

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[3] ***FNPRM*** at ¶ 140.
[4] ***Report and Order*** at ¶ 1
[5] ***FNPRM*** at ¶ 143.

632(d)(2) of the Communications Act, 47 U.S.C. § 552(d)(2), which addresses consumer protection, makes clear that local authority to impose customer service requirements, including those that may exceed the FCC's minimum customer service standards, is preserved by the Communications Act. Because the preservation of local authority in § 632(d)(2) is unambiguous on its face, the FCC cannot take any preemptive action in this area.

II. THE FCC'S *REPORT AN ORDER*, AND THE RULES AND FINDINGS CONTAINED THEREIN RE UNLAWFUL, ARBITRARY AND CAPRICI(

The LFAs do not believe the FCC has the authority to adopt the rules and findings in the *Report and Order* and therefore consider the *Report and Order,* and the rules, findings and pronouncements contained therein, to be unlawful. The bases for the LFAs' belief are contained in comments previously filed with the FCC and will not be recapitulated here.[6] Suffice it to say the *Report and Order* attempts to re-write the Communications Act in several respects – an action that can only be undertaken by Congress. Moreover, the rules adopted by the FCC are not based on substantial and/or credible evidence contained in the record. Consequently, the FCC's rules are arbitrary and capricious.[7] Because the rules are both unlawful and arbitrary and

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[6] *See* Initial Comments of the Burnsville/Eagan Telecommunications Commission; the City of Minneapolis, Minnesota; the North Metro Telecommunications Commission; the North Suburban Communications Commission; and the South Washington County Telecommunications Commission, *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, us amended by the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 20 FCC Rcd 18581 (Feb. 10,2006) and the Reply Comments of the Burnsville/Eagan Telecommunications Commission; the City of Minneapolis, Minnesota; the North Metro Telecommunications Commission; the North Suburban Communications Commission; and the South Washington County Telecommunications Commission, *In the Matter of Implementation of Section 621(a)(1) ojthe Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992,* Notice of Proposed Rulemaking, 20 FCC Rcd 18581 (March 28,2006).

[7] *See, e.g., People of the State of California v. FCC,* 905 F.2d 1217, 1230 (9th Cir. 1990) (stating that an agency decision must be overturned if the decision lacks record support).

capricious, they cannot be applied to cable operators with existing franchise agreements at any time, let alone at franchise renewal.

Moreover, the FCC's rules are predicated on language in § 621(a)(1) of the Communications Act, **47** U.S.C. § 541(a)(1), which states that local franchising authorities "may not unreasonably refuse to award an additional competitive franchise."* Because this language does not, on its face, apply to cable operators that already possess a franchise (and in almost all cases are already providing service to consumers), the FCC cannot rely § 621(a)(1) as a source of authority for applying its new rules, findings and pronouncements to incumbent cable operators at franchise renewal. Furthermore, the LFAs posit that Congress has provided the FCC with absolutely no authority to interfere with the franchise renewal process. Except for providing cable operators with certain limited protections (particularly in the formal franchise renewal process set forth in § 626(a)-(g) of the Communications Act, 47 U.S.C. § 546(a)-(g)), Congress left it state and/or local governments to determine how to conduct franchise renewal, so as to ensure that local needs and interests are satisfied, and that outstanding franchise violations are resolved appropriately.

It is also important to recognize that the terms and conditions of renewal franchise agreements are specifically governed by § 626 of the Communications Act, 47 U.S.C. § 546, and any applicable state and/or local laws[9] – not § 621(a)(1). **As** discussed below, extending the FCC's rules to incumbent cable operators at renewal will impermissibly conflict with § 626. The FCC therefore must refrain from applying the ***Report and Order*** to incumbent cable operators at the time of franchise renewal. Indeed, it is a fundamental canon of statutory construction that the

[8] *See, e.g.*, ***Report and Order*** at ¶ 1

[9] *See, e.g.*, MINN. **STAT.** § 238.084.

FCC must avoid interpreting one statutory provision in a manner that deprives another of meaning.[10]

III. IT IS PREMATURE TO APPLY THE RULES ADOPTED IN THE *REPORT AND ORDER* TO INCUMBENT CABLE OPERATORS AT RENEWAL.

A. Administrative Efficiency Would Be Advanced by Taking No Action in the *FNPRM* Until All Outstanding Appeals Have Been Resolved.

Because the legality of the *Report and Order* has been challenged by numerous entities, it would be premature to apply the rules, pronouncements and findings in the *Report and Order* to incumbent cable operators until all the outstanding appeals have been resolved. Additional facts and legal arguments will undoubtedly be made during the appeals process and those facts and arguments will likely have a direct bearing on the legality, scope and applicability of the FCC's rulings in the *Report and Order*. In addition, it would be most administratively efficient to withhold taking any further action in the *FNPRM* unless and until there is a valid, binding and non-appealable judicial finding that the *Report and Order* is lawful.[11] Any agency action prior to final judicial review will almost certainly result in further litigation. Moreover, if and when the *Report and Order* (and the *FCC's* rulings therein) are overturned on appeal, it may prove impossible to undo the harm caused to local franchising authorities while the rules were in effect. For instance, many local franchising authorities may have been forced to give up significant benefits in long-term renewal franchise agreements with incumbent cable operators in light of

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[10] *See, e.g., Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 85 (2nd Cir. 1995) and *United States v. Blasius*, 397 F.2d 203, 207 n. 9 (2nd Cir. 1968) (stating that a statute should not be construed as containing superfluous or meaningless words). *See also Aluminum Co. of America v. Dept. of Treasury*, 522 F.2d 1120, 1126-27 (6th Cir. 1975); *Bird v. United States*, 187 U.S. 118, 124 (1902); *United States v. Powers*, 307 *U.S.* 214,217 (1939); *United States v. Shaver*, 506 F.2d 699 (4th Cir. 1974); and *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672,689 (D.C. Cir. 1973).

[11] The LFAs once again reiterate their position that the *Report and Order* is unlawful, arbitrary and capricious.

the *Report and Order* and may not be able to modify those agreements, once the FCC's new rules are invalidated in whole or part.

The LFAs therefore urge the FCC not to apply the rules, findings and pronouncements in the *Report and Order* to incumbent cable operators until all appeals are exhausted and the *Report and Order* has been upheld (in whole or in part). The Commission can re-examine the necessity of applying the rules to incumbent operators following the completion of the appeals process. This course of action is the most logical and efficient, and will further Congress' goal of ensuring that local cable-related needs and interests are satisfied through the franchise renewal process.[12]

B. The FCC Must Clarify the Applicability of Initial Rules Before Applying Them to Incumbent Cable Operators at Franchise Renewal.

It is premature to apply the rules adopted in the *Report and Order* to any entity until the FCC, the courts or Congress decides that video services offered by a telephone company over Internet Protocol are cable services, subject to the same federal, state and local laws as the video services provided by an incumbent cable provider, such as Comcast and Time Warner Cable. This issue was not addressed in the *Report and Order* and remains the "white elephant in the room." Accordingly, it is unclear to whom precisely the FCC's "new entrant" rules apply. It makes sense to answer this question before extending the *Report and Order* to incumbent cable operators, particularly since those operators could begin providing video services using technologies the same as or similar to those employed by AT&T, who claims that its video service is not a cable service

[12] *See* Section 601(2) of the Cable Communications Policy Act of 1984, as amended (the "Cable Act"), 47 U.S.C. § 521(2).

While the ***Report and Order*** was issued by the FCC to address "new competitors," and "new entrants" such as "traditional phone companies . . . primed to enter the cable market . . .",[13] the FCC left it entirely unclear to whom, if anyone, these new rules actually applied. According to the FCC, the terms "new competitors" or "new entrants" were intended "to describe entities that opt to offer 'cable service' over a 'cable system' utilizing public rights-of-way, and thus are defined under the Communications Act as 'cable operator[s]' that must obtain a franchise."[14] Because new entrants such as AT&T are multichannel video program distributors[15] whose services fall within the Cable Act's definition of "cable service,"[16] it would appear that AT&T's Internet Protocol video service should be subject to Title VI of the Cable Act and applicable federal, state and local laws and regulations. AT&T, however, has disputed, incorrectly, that its video product can be classified as a cable service. Because AT&T's position is untenable, it is puzzling why the FCC would issue a 109-page order frequently referring to and benefiting local telephone companies, ostensibly pursuant to authority primarily reposed in Title VI of the Communications Act," but then apparently leave a fundamental question unanswered by stating "we do not address in this Order whether video services provided over Internet Protocol are or are not 'cable services.'"[18] It is somewhat unclear from the ***Report and Order*** if the FCC meant to limit its discussion to interactive on-demand services or to extend its determination to all video services provided using Internet Protocol. To avoid confusion concerning the applicability of its rules (should they be upheld on appeal), the FCC should make it explicitly clear that video

[13] ***Report and Order*** ¶ *2.*
[14] *Id.* at n. 24.
[15] See ***Pacific Bell Tel.*** *Co.* ***v. City of Walnut Creek,*** 428 Supp.2d 1037, 1047 (N.D. Cal. 2006).
[16] ***See*** 47 U.S.C. § 522(6).
[17] **As** discussed elsewhere in these comments, the LFAs do not agree that the FCC has the authority to issue the rulings in the ***Report and Order.***
[18] ***Report and Order*** ¶ 124.

services provided over Internet Protocol are cable services under Title VI of the Communications Act and applicable state and local laws and regulations.[19]

If the FCC fails to clarify the scope of its rules, it could be argued by video service providers and others that the ***Report and Order*** does not apply to any new entrant, since telephone companies like AT&T could maintain that their video service is not a cable service. Although Qwest is not offering video service in any of the LFAs' service territories, it currently plans to utilize Internet Protocol technology similar to AT&T's and to follow AT&T's regulatory strategy. Presumably, this is why Qwest has sponsored legislation in both Minnesota and Washington in which it classifies its anticipated service differently than incumbent cable operators' cable services." Fortunately, the legislators in Minnesota and Washington have not fallen for such nonsense, but the lack of clarity on the issue only promotes inconsistent legislation across the United States, and could create regulatory inconsistencies if the ***Report and Order*** is ultimately inapplicable new entrants, but is applied to incumbent cable operators at the time of franchise renewal.

IV. THE FRANCHISE APPLICATION RULES IN THE *REPORT AND ORDER* CANNOT LAWFULLY APPLY TO INCUMBENT CABLE OPERATORS.

A. The FCC's Franchise Application Rules are Inconsistent with the Formal Renewal Process Set forth in the Communications Act.

The ***Report and Order*** specifies that local franchising authorities must grant or deny a cable franchise application received from an entity with existing authority to occupy public

[19] The FCC does have another docket open in which it could also specifically address the classification of video services provided over Internet Protocol. ***See ZP-Enabled Services,*** 19 FCC Rcd 4863 (2004); ***Petition of SBC Communications, Inc. for a Declaratory Ruling,*** WC Docket No. 04-36 (filed Feb. 5, 2004); and Letter from James C. Smith, Senior Vice President, SBC Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-36 (filed Sept. 14,2005).

[20] H.F. 2351, 85th Leg. Sess. (Mn. 2007); S.F. 2216, 85th Leg. Sess. (Mn. 2007); H.B. 1983, 60th Leg. Reg. Sess. (Wa. 2007); and S.F. 6003, 60th Leg. Reg. Sess. (Wa. 2007).

rights-of-way within ninety (90) days of the date a complete application is received (unless the parties agree to an extension of time)." Local franchising authorities have 180 days to grant or deny a complete franchise application received from an entity that does not have existing authority to utilize public rights-of-way in its proposed franchise area.[22] If a local franchising authority does not act within the prescribed deadlines, a cable franchise applicant will automatically be authorized to provide cable service on an interim basis, in accordance with the terms and conditions it proposed in its application.[23] According to the FCC, this competitive franchising process was adopted to prevent "unreasonable delays" in the franchise process that were purportedly depriving consumers of competitive video services and hampering broadband deployment.[24] An incumbent cable operator's services, however, are already widely available to consumers throughout its franchise territory. Thus, the underlying rationale for the FCC's competitive franchise application process is not applicable to incumbent cable operators. Extending the process to incumbent cable operators would, therefore, be arbitrary and capricious.[25]

The *FNPRM* tentatively concludes that the competitive franchise application process in the *Report arid Order* should apply to incumbent cable operators at franchise renewal. Doing so, however, would be inconsistent with § 626 of the Communications Act, 47 U.S.C. § 546. In this regard, it is clear that the Cable Act's formal renewal process can only be started during the 6-

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[21] *See, e.g., Report and Order* at ¶¶ 67 and 75 and 47 C.F.R. § 76.41(b) and § 76.41(d).
[22] *See, e.g., Report and Order* at ¶ 72 and 47 C.F.R. § 76.41(b) and § 76.41(d).
[23] *See, e.g., Report and Order* at ¶ 67 and 47 C.F.R. § 76.41(e).
[24] *See, e.g., Report und Order* at ¶¶ 67 and 71.
[25] Incumbent cable operators would, in most cases, have existing authority to use public rights-of-way. Consequently, the FCC's 180-day deadline would not apply to cable operators with existing franchises in any event.

month period that begins with the thirty-sixth month prior to franchise expiration? the "formal" franchise application process created by the FCC can be commenced at any time. Accordingly, the FCC's "renewal" process cannot be reconciled with § 626(a)(1). This is also the case because, if the formal franchise renewal process has been invoked, § 626(a) requires local franchising authorities to conduct a needs ascertainment and past performance review proceeding prior to the submission of any franchise renewal application/proposal.[27] The FCC's rules, however, would apparently permit an incumbent cable operator to submit a franchise renewal proposal at any time, notwithstanding the substantive and procedural requirements of § 626(a). Once § 626(a) has been invoked, a renewal franchise application or proposal cannot be filed until the local franchising authority's needs ascertainment and past performance proceeding has been completed.[28]

Moreover, § 626(b)(3) of the Communications Act, 47 U.S.C. § 546(b)(3), permits a local franchising authority to "establish a date by which . . . [a renewal] proposal shall be submitted."[29] Thus, to the extent that the FCC's rules permit the submission of a formal franchise renewal proposal/application prior to the date set by the franchising authority, they are inconsistent with the Communications Act, and cannot be applied to incumbent cable operators at franchise renewal.

It is also important to note that Congress did not impose any deadline on the completion of the § 626(a) proceeding. In deciding not to set arbitrary deadlines for conducting a needs assessment and past performance review, Congress recognized that the scope and specific characteristics of § 626(a) proceedings will vary depending on the circumstances in a particular

[26] 47 U.S.C. § 546(a)(1).
[27] 37 U.S.C. § 546(a) and § 546(b)(1).
[28] 47 U.S.C. § 546(b)(1).
[29] 47 U.S.C. § 546(b)(3).

community. Local franchising authorities are therefore free to plan and implement their own needs assessment and past performance reviews as long as the limited procedural requirements prescribed by Congress in §§ 626(a)(1) and 626(a)(2), 47 U.S.C. §§ 546(a)(1) and 546(a)(2), are followed. In this regard, Congress merely dictated when the "formal" renewal process may be initiated and specified that the public must be given appropriate notice and an opportunity to participate in the assessment of a community's future cable-related needs and interests and the review of the incumbent cable operator's performance under its franchise. Local franchising authorities *are* permitted to take as long as they need to complete their needs assessment and past performance review. Extending the 90- or 180-day deadlines in the ***Report and Order*** to franchise renewals would, therefore, clearly conflict with the plain language of § 626(a)(1) by effectively establishing a ***de facto*** deadline of less than 90 or 180 days to complete the § 626(a) proceeding.

In determining whether and how to apply its "new entrant" rules to incumbent cable operators, the Commission cannot ignore or circumvent the plain language of Section 626 of the Communications Act, which, as noted above, mandates that local franchising authorities using the formal renewal process conduct a proceeding in which the incumbent cable operator's performance under its existing franchise is evaluated prior to the submission of a franchise renewal proposal/application.[30] This type of past performance review necessarily involves the incumbent cable operator and local franchising authorities may require the operator to respond to (i) appropriate information requests concerning franchise compliance and (ii) notices of violation, in accordance with the terms of the relevant franchise documents, as **part** of the

[30] *See* Sections 621(a)(1) and 621(b)(1) of the Communications **Act,** 47 U.S.C. §§ 546(a)(1) and 546(b)(1).

review. Accordingly, the ***Report and Order***[31] and 47 C.F.R. § 76.41(c), which prohibit local franchising authorities from requiring a franchise applicant to "engage in any regulatory or administrative processes prior to the filing of an application," are inconsistent with §§ 626(a)(1) and 626(b)(1) of the Communications Act and cannot be applied to incumbent cable operators and local franchising authorities engaged in the formal renewal process.

Section 626(b)(2) of the Communications Act, 47 U.S.C. § 546(b)(2), provides local franchising authorities with the sole discretion to determine what information must be included in a formal franchise renewal proposal/application (subject to applicable state and federal law).[32] If applied to incumbent cable operators and local franchising authorities using the formal renewal process, § 76.41 of the FCC's rules would conflict with § 626(b)(2) because it would impermissibly require certain information to be included in formal franchise renewal proposals, over and above that which is already required or permitted by state and local law. While the information required by the FCC may be helpful, under § 626 it is **up** to local franchising authorities, not the FCC, to decide what information, commitments and materials must be included in a renewal proposal, based on the results of the § 626(a) proceeding and any applicable state and local laws and/or requirements.

Once a complete formal franchise renewal proposal/application containing all information required by a local franchising authority is timely submitted, the franchising authority has four (4) months to review the proposal and to renew the incumbent cable operator's franchise or issue a preliminary denial.[33] The FCC's rules contain different deadlines for acting

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[31] ***See, e.g., Report and Order*** at ¶ ***75.***

[32] 47 U.S.C. § 546(b)(2) states that "[s]ubject to section 624, any such [formal franchise renewal] proposal shall contain such material as the franchising authority may require, including proposals for an upgrade of the cable system."

[33] *See* 47 U.S.C. § 546(c)(1).

on applications, which would be inconsistent with the Communications Act if extended to cable operators and local franchising authorities that are subject to the formal franchise renewal process.

Furthermore, under § 626(c)(1) of the Communications Act, 47 U.S.C. § 546(c)(1), failure to take final action on a renewal franchise application, by issuing a preliminary denial (or failing to act at all), does not automatically result in the issuance of an interim franchise on the terms proposed by the applicant. Rather, § 626(c)(1) provides for an administrative proceeding after which another determination concerning the renewal or denial of a franchise is made. The ***Report and Order*** and the FCC's rules do not account for this process. In fact, by forcing a franchise applicant's self-serving terms and conditions on local franchising authorities after the expiration of an arbitrary deadline, 47 C.F.R. § 76.41(e) would clearly contravene 47 U.S.C. §§ 546(a) and 546(c)(1)(D), which require a cable operator to satisfy a community's cable-related needs and interests in the context of franchise renewal.[34] In other words, the FCC's rules

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[34] ***See,*** *e.g.*, § 601(2) of the Communications Act, 47 U.S.C. § 521(2) (stating that the purpose of the Cable Act is to "establish franchise procedures and standards which . . . assure that cable systems are responsive to the needs and interests of the local community. . ."); ***Union CATV,*** *Inc.* v ***City of Sturgis,*** 107 F.3d 434, 438-42 (6th Cir. 1997); H.R. Rep. No. 98-934, 98th Cong., 2nd Sess. at 25, ***reprinted in*** 1984 U.S.C.C.A.N. 4655,4662 (1984) (§ 626 of the Communications Act is "designed to give some stability and certainty to the renewal process, while continuing to provide the franchising authority with the ability to assure that renewal proposals are reasonable to meet community needs and interests"); ***id.*** at 26, ***reprinted in*** 1984 U.S.C.C.A.N. 4655,4663 (Congress intended that "the franchise process take place at the local level where [local] officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs."). Congress also stated that "the ability of a local government entity to require particular cable facilities (and to enforce requirements in the franchise to provide those facilities) is essential if cable systems are to be tailored to the needs of each community [and the Cable Act] explicitly grants this power to the franchising authority." *Id.* According to the House Report on H.R. 4103, whose terms were later incorporated into the Cable Act, "The bill establishes franchise procedures and standards to . . . assure that cable systems are responsive to the needs and interests of the local communities they service." H.R. Rep. No. 98-934, 98th Cong., 2nd Sess. at 19, ***reprinted in*** 1984 U.S.C.C.A.N. 4655,4656 (1984).

would permit a cable operator seeking franchise renewal to obtain a franchise to utilize the public rights-of-way (even if only on a temporary basis) in accordance with its own needs and interests, instead of the needs and interests of the community, as determined by the local franchising authority. Accordingly, the FCC should refrain from applying its new rules to incumbent cable operators and/or local franchising authorities that have properly invoked Section 626(a)-(g) of the Communications Act, 47 U.S.C. § 546(a)-(g).

B. The FCC's Franchise Application Rules are Inconsistent with the Informal Renewal Process Set forth in the Communications Act.

Section 626(h) of the Communications Act, 47 U.S.C. § 546(h), which sets forth the federal informal franchise renewal process, states that:

> a cable operator may submit a proposal for the renewal of a franchise pursuant to this subsection at any time, and a franchising authority may, after affording the public adequate notice and opportunity to comment, grant or deny such proposal at any time . . .

Because a franchising authority may grant or deny an informal renewal proposal "at any time," the deadlines in the FCC's **rules** and ***Report and Order*** cannot logically or legally apply.

Moreover, since there are no deadlines for action in § 626(h), and because **a** local franchising authority may grant or deny an informal franchise renewal at any time and for any reason, the FCC cannot lawfully impose an interim franchise on local governments through the extension of 47 C.F.R. § 76.41(e). Indeed, the informal renewal process clearly contemplates that both parties will negotiate and agree on the contents of a renewal franchise? Any franchise application requirements that the FCC might mandate would be consistent with § 626(h) because

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[35] ***See*** H.R. Rep. No. 98-934, 98th Cong., 2nd Sess. at 72, ***reprinted*** *in* 1984 U.S.C.C.A.N. 4655, 4709 (1984) (the "provisions contained in this section are not mandatory. A cable operator and a franchising authority may negotiate the renewal of a franchise independent of this section. Also, independent of this section they may reach agreement on franchise renewal at any time after the procedures under this section have been initiated.").

the informal renewal process clearly permits a cable operator to decide what terms and conditions to include in its informal renewal proposal (which terms and conditions should be based on local cable-related needs and interests identified by the local franchising authority). Likewise, local franchising authorities have the ability to influence the content of informal renewal proposals through ongoing discussions with an incumbent cable operator, and by proposing their own terms or rejecting or modifying terms that have been proposed by the operator. The FCC's rules therefore cannot be squared with the wide latitude and broad authority accorded to local franchising authorities under the informal franchise renewal process. Indeed, the FCC's rules would effectively convert the informal renewal process into a second formal renewal process (which process, as discussed, ***supra,*** would be inconsistent with the formal renewal process established by Congress).

V. THE FCC'S PRONOUNCEMENT CONCERNING THE BUILD-OUT OF NEW CABLE SYSTEMS IS IRRELEVANT TO EXISTING CABLE SYSTEMS AND CANNOT BE APPLIED TO INCUMBENT CABLE OPERATORS AT FRANCHISE RENEWAL.

The ***Report*** *and* ***Order*** concludes that build-out requirements, in many cases, may constitute unreasonable barriers to entry into the multichannel video distribution market.[36] Based on this assumption, which is fallacious, the FCC determined that § 621(a)(1) of the Communications Act, 47 U.S.C. § 541(a)(1), prohibits franchise denials based on unreasonable build-out requirements."[37] Section 621(a)(1), however, does not apply to incumbent cable operators seeking franchise renewal; it only applies to applicants for additional competitive franchises. Accordingly, the language in that provision which states that franchising authorities

[36] *See, e.g.*, ***Report*** *and* ***Order*** at ¶¶ 82, 87 and 89.
[37] *Report* ***and Order*** at ¶¶ 83, 87 and 89.

cannot "unreasonably refuse to award an additional competitive franchise"[38] cannot be used to establish a "reasonableness" standard for build-out requirements in the renewal of existing franchise agreements. This is particularly true since the FCC's underlying concerns regarding market entry barriers are not germane to incumbent cable operators – they are already in the market and providing service to consumers. Moreover, any issues concerning the reasonableness of build-out requirements can be dealt with under the existing § 626 statutory framework, which adequately protects a cable operator's interests.[39] Accordingly, the FCC's "rule" concerning build-out provisions is entirely unnecessary for franchise renewals.

The FCC's examples of unreasonable build-out requirements underscore that any application of its § 626(a)(1) "reasonableness" test to renewal build-out requirements is both unnecessary and inappropriate. For instance, the FCC's conclusion that "it would seem unreasonable to require a new competitive entrant to serve everyone in a franchise area before it has begun providing service to anyone"[40] is completely unrelated to franchise renewals because an incumbent cable operator is already serving subscribers and has been doing so for an extended period of time. Likewise, the finding that "it would seem unreasonable to require facilities-based entrants, such as incumbent LECs, to build out beyond the footprint of their existing facilities before they have even begun providing cable service"[41] would not apply to franchise renewals because incumbent cable operators have an embedded customer base and

[38] 47 U.S.C. § 541(a)(1).

[39] See, *e.g.*, 47 U.S.C. §§ 546(c)(1) and 546(d), which delineate the exclusive grounds upon which a franchise renewal request can be denied under the formal renewal process and 47 U.S.C. § 546(e)(1), which provides that any cable operator whose renewal franchise proposal has been denied by a final decision of a franchising authority or has been adversely affected a franchising authority's failure to act in accordance with the procedural requirements of § 626 may file an appeal with a court of competent jurisdiction pursuant to §635 of the Cable Act, 47 U.S.C. § 555.

[40] *Report and* ***Order*** at ¶ 89.

[41] *Id.*

have constructed their system pursuant to build-out requirements voluntarily agreed to in an existing franchise agreement. Furthermore, the possibility of requiring "more of a new entrant than an incumbent cable operator" by forcing it "to build out its facilities in a shorter period of time than that originally afforded to the incumbent cable operator"[42] or to "provide service to areas of lower density"[43] than the incumbent cable operator will not be an issue in the context of franchise renewal because a renewal applicant is the incumbent provider. Plus, as a practical matter, an incumbent cable operator will in most instances have completely built out its system, in accordance with applicable build-out requirements in its existing franchise, before it is time to consider franchise renewal. This is generally the case in the LFAs' existing franchise areas.[44]

With respect to the informal franchise renewal process, the parties will negotiate and agree to specific build-out requirements in a renewal franchise, as needed. Because a cable operator knowingly and voluntarily assents to such requirements they are ***per se*** reasonable. The LFAs, for example, negotiated various build-out provisions with Comcast, or its predecessor(s) in interest, in conjunction with awarding initial franchises or renewing existing cable franchises.[45] Comcast has never indicated that those provisions are unreasonable.

With respect to the formal franchise renewal process, local franchising authorities can assure that their cable-related needs and interests are met, including any need for build-outs to particular areas, taking cost into consideration.[46] In this regard, Section 624(b)(1) of the

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[42] *Id.*

[43] *Id.*

[44] The City of Renton, Washington is in the process of annexing some contiguous areas. Those areas will be built out in accordance with the terms of the current franchise.

[45] The applicable provisions generally require the extension of the cable system to those areas of the franchise temtory with a density of at least 35 homes per mile. The Minnesota LFAs agreed to increase the density requirement to SO homes per mile if underground construction would be required.

[46] *See. e.g.*, 47 U.S.C. § 546(a)(1) and47 U.S.C. § 546(c)(1)(D).

Communications Act, 47 U.S.C. § 544(b)(1), permits local franchising authorities to establish requirements for cable-related facilities and equipment, while Section 632(a)(2), 47 U.S.C. § 552(a)(2), authorizes franchising authorities to establish construction-related requirements, which would obviously include build-out provisions. In addition, the legislative history of the Cable Act makes clear that:

> [m]atters subject to state and local authority include, to the extent not addressed in the legislation, certain terms and conditions related to the grant of a franchise (*e.g.*, duration of the franchise term, delineation of the service area) [and] the construction and operation of the system (*e.g.*, extension of service, safety standards, timetable for construction) . . .[47]

Build-out requirements are not specifically addressed in the Communications Act, other than the limitation in § 621(a)(4)(A), which states that "in awarding a franchise, the franchising authority shall allow the applicant's cable system a reasonable period of time to become capable of serving all households in the franchise area . . ."[48] Accordingly, those requirements can be imposed through the formal renewal process consistent with the Communications Act and applicable state and local law.[49] If an incumbent cable operator believes particular build-out requirements are unreasonable, it can avail itself of the protections of the formal renewal process, as discussed above. No new rules are necessary given the existing statutory scheme. Indeed, the indiscriminate application of the FCC's "new entrant" rules concerning "unreasonable" build-out requirements would almost certainly conflict with §§ 624(b)(1),

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[47] ***See*** H.R. Rep. No. 98-934, 98th Cong., 2nd Sess. at 59, ***reprinted in*** 1984 U.S.C.C.A.N. 4655, 4663 (1984) at 59, ***reprinted in*** 1984 U.S.C.C.A.N 4696 (1984). ***See also Housatonic*** *Cable* ***Vision Co. v. Dept.*** *of Public Utility* ***Control,*** 622 F. Supp. 798,807 (D. Conn. 1985) (Sections 544(b) and 552(a) of the Communications Act "make it clear that Congress did not take away the power of the state [or its political subdivisions] as franchising authority to require that a cable operator construct a given portion of its franchise area on a specified schedule . . . Congress viewed line extension as a particularly appropriate subject for the exercise of local control.").

[48] 47 U.S.C. § 541(a)(4)(A).

[49] *See* MINN. **STAT.** §§ 238.08, subd. 1(a) and 238.084, subd. 1(m).

626(a)(1) and 632(a)(2) of the Communications Act, which permit local franchising authorities to impose build-out requirement that ensure their community's cable-related needs and interests are satisfied over the term of a renewal franchise (taking cost into consideration).

VI. THE FCC'S DETERMINATIONS CONCERNING FRANCHISE FEES SHOULD NOT APPLY TO INCUMBENT CABLE OPERATORS IN SEVERAL INSTANCES.

If the FCC decides that it is not premature to proceed any further with the ***FNPRM,*** there are several instances where it must not apply its conclusions concerning the definition of franchise **fees** to incumbent cable operators at franchise renewal.

A. PEG Access and Institutional Network Obligations in Agreements Outside of the Franchise Agreement Are Not Subject to the Federal Franchise Fee Cap.

Institutional network and PEG access obligations are not always part of cable franchise agreement consideration. The LFAs urge the Commission to review and consider the various external obligations that cable operators have in constructing institutional networks and funding PEG access prior to applying the rules in the ***Report and Order*** to incumbent cable operators. In this regard, cable operators have, in some instances, voluntarily agreed to construct institutional networks for LFAs as part of a settlement agreement.[50] In other cases, a cable operator has agreed to certain PEG funding and institutional network commitments outside and independent of the franchising process as part of a settlement of multiple lawsuits.[51] Cable operators and local franchising authorities have also entered into Memoranda of Understanding, which contain

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[50] ***See*** City of Renton, Committee of the Whole Committee Report (Sept. 8, 1997), attached hereto as Exhibit **A.**

[51] ***See*** City of Minneapolis, Petition 271337, Settlement Agreement and Mutual Release, dated July 20, 2006, ***available*** *ut* http://www.ci.minneapolis.mn.us/council/archives/proceedings/2006/20060720-proceedings-special.pdf

PEG access funding, to settle rate disputes.[52] These agreements, which are separate and distinct from cable franchising, cannot be subject to the franchise fee determinations in the **Report and** *Order,* as they are not franchise obligations and have been voluntarily agreed to by the parties.

B. Institutional Network Commitments Paid for By Local Franchising Authorities Are Not Franchise Fees.

Under some cable franchises, local franchising authorities have agreed to pay the incumbent cable operator for the construction of institutional network facilities.[53] In some instances, local franchising authorities have paid cable operators thousands of dollars for institutional network construction. In those circumstances where a local franchising authority has paid a cable operator the actual cost for institutional network construction, the franchise fee determinations in the *Report and Order* cannot apply because the cable operator was made whole upon the receipt of payment.

C. In-Kind Contributions are Not Franchise Fees.

In many cable franchises, local franchising authorities received institutional networks in the form of an in-kind contribution. **As** such, they are not taxes, fees or assessments for purposes of the Communications Act definition of franchise fees.[54] Even if institutional network facilities and equipment could be considered franchise fees (which they cannot), the FCC's rate regulation rules have permitted cable operators to fully recover the costs of these networks through their

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[52] *See, e.g.,* the North Suburban Communications Commission Memorandum of Understanding with Meredith Cable, dated November 3, 1994, *available at* http://www.nsccmn.org/pdf/franchise%20agreement/MemofUnderstanding94.pdf.

[53] *See, e.g.*, the South Washington County Telecommunications Commission Cable Franchise, Paragraph 7.1.12, *available at* **http://www.swctc.org/document**:WCTC%20Franchise%20Adopted%20103002.pdf

[54] *See* Section 622(g)(1) of the Communications Act, 47 U.S.C. § 542(g)(1).

rates.[55] Consequently, cable operators cannot deduct the cost or value of institutional networks from franchise fees now or at franchise renewal because doing so would result **in** an impermissible double-recovery of costs. It is also important to understand that institutional networks have been negotiated and agreed to by local franchising authorities and cable operators with no expectation that the cost or value of these networks would be deducted from franchise fees in any manner at any time, and this has been the actual practice over the years. Accordingly, the ongoing course of dealing between the parties effectively functions as a waiver of any right to deduct institutional network costs or value from franchise fees that may arguably exist as a result of the *Reporr and Order,* and the FCC's franchise fee pronouncements in the *Report and Order* cannot supersede this voluntary waiver.

VII. THE LFAs AGREE WITH THE FCC'S TENTATIVE CONCLUSION THAT IT CANNOT PREEMPT LOCAL AUTHORITY TO ADOPT OR AGREE TO CUSTOMER SERVICE STANDARDS OR REOUIREMENTS THAT EXCEED FCC STANDARDS OR THAT ADDRESS SUBJECTS NOT COVERED BY THE FCC'S STANDARDS.

In the *FNPRM* the FCC tentatively concludes that "we cannot preempt state or local customer service **laws** that exceed the Commission's standards, nor can we prevent **LFAs** and cable operators from agreeing to more stringent standards."[56] The LFAs agree with this position and strongly encourage the FCC not to take any preemptive action, because such action is not supported by the plain language of § 632(d)(2) of the Communications Act, which states:

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[55] *See In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* 11 FCC Rcd 388,440 (1995); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service,* 9 FCC Rcd 4521,4615 (1994); and *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* 11 FCC Rcd 2220.2254 (1996).

[56] *FNPRM* at ¶ 143.

> [n]othing in this Section shall be construed to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission . . . Nothing in this Title [IV] shall be construed to prevent the establishment and enforcement of any municipal law or regulation, **or** any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section.[57]

It is clear from this unambiguous text that Congress intended to broadly preserve state and local authority to protect consumers from cable operator indiscretions and unscrupulous behavior. The legislative history of the Cable Act, for instance, clearly states that "this subsection preserves local authority to establish and enforce any municipal law or regulation, or any state law, concerning customer requirements that are more stringent than, or address matters not addressed by, the standards established by the FCC . . ."[58] The Communications Act and the relevant legislative history therefore speak plainly and directly to the question at issue – whether state or local customer service laws or requirements that exceed FCC standards or address areas

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[57] 47 U.S.C. § 552(d)(2).

[58] H.R. Rep. No. 102-628, 102nd Cong., 2d Sess. at 106 (1992). *See* ***also*** id. at 36, wherein the House Committee on Energy and Commerce stated "[w]hile the Committee commends the cable industry for taking steps to improves the quality of customer service, the Committee questions whether the [NCTA] guidelines are stringent enough and whether a self-policing mechanism can be successful in addressing the serious concerns of customers about the cable industry's customer service practices." The House Conference Report, which adopted Section 7 of the House amendment, stated:

> franchising authorities and cable operators are permitted to agree to customer service requirements, even if those requirements result in the establishment and enforcement of customer service standards more stringent than the standards established by the FCC under section 632(b). Finally, this subsection preserves local authority to establish and enforce any municipal law or regulation, or any state law, concerning customer service requirements that are more stringent than, or address matters not addressed by, the standards established by the FCC . . .

H. Conf. Rep. No. 102-862, 102nd Cong., 2d Sess. at 78, *reprinted in* 1992 U.S.C.C.A.N 1231, 1261 (1992).

distinct from the matters covered by the FCC's standards can be preempted the answer is unequivocally "no" because state and local authority is explicitly maintained.[59] Thus, any preemptive action by the FCC in this area would exceed its lawful authority.[60]

It should be noted that the FCC need only reaffirm its existing interpretation of § 632(d) to dispose of this issue properly. In *Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992: Consumer Protection and Customer* Service, 8 FCC Rcd 2892 (1993), the FCC determined that:

> [s]hould local governments wish to exceed the customer service standards we adopt today, they may do so through the franchising process or otherwise with the consent of the cable operator, or they may enact an appropriate law or regulation. In this latter regard, we find that . . . [Section 632(d)] of the Communications Act does not prevent the enactment and enforcement of any State or municipal law or regulation concerning consumer protection or customer service which imposes service requirements that exceed, or involve matters not addressed by, the Federal standards.[61]

At the same time, the FCC found that Section 632(d) affirmatively and "expressly permits local governments to adopt standards exceeding those established by the Commission either with the consent of the cable operator or by enactment of an appropriate law or regulation."[62] These

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[59] When Congress has expressed its will "in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993).

[60] *See, e.g., Chevron, U.S.., Inc. v. Nat'l Resources Defense Council, Inc.*, 461 U.S. 837 (1984) (federal administrative agency must give effect to the unambiguously expressed intent of Congress); *Southern Co. v. FCC*, 293 F.3d. 1338, 1345 (11th Cir. 2002) (holding that FCC action must be "struck down" to the extent it "fails to give effect to the unambiguous intent of Congress"); and *Apex Express Corp. v. The Wise Co.*, 190 F.3d 624 (4th Cir. 1999) (stating that an agency must give effect to the unambiguously expressed intent of Congress).

[61] *See Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992: Consumer Protection and Customer* Service, 8 FCC Rcd 2892, 2895-96 (1993). *See also* id. ("Sections 632(a) and (c) [referring to what it now Section 632(d)] preserve the ability of local governments to exceed the FCC standards through the franchising or regulatory process when additional obligations are deemed necessary.").

[62] ***Id.*** at 2895.

determinations are as valid today as they were in 1993, as the substantive text of § 632(d) has not changed and there is still a compelling need to protect consumers from unfair and inappropriate cable operator practices – regardless of whether the operator is a new entrant or an established cable service provider. Although wireline cable service competition is developing, there will always be a need for local oversight of cable operators and the power to provide appropriate relief to consumers that have been victimized by improper cable industry conduct. Congress acknowledged this fact when it adopted what is now § 632(d)(2) at the same time it enacted changes to § 621(a) that were designed to encourage additional cable service providers to enter the multichannel video program distribution market. Consequently, there is no policy or statutory basis for preempting local consumer protection authority, and the FCC must refrain from doing so.

VIII. CONCLUSION.

For the foregoing reasons, the FCC cannot apply the ***Report and Order,*** and the rules, findings and pronouncements contained therein, to incumbent cable operators at the time of franchise renewal. In addition, given the unambiguous preservation of local authority in § 632(d)(2) of the Communications Act, the FCC does not have the power to preempt local laws or requirements that exceed the FCC's minimum customer service standards or address subjects different from those addressed in the federal standards.

CERTIFICATION PURSUANT TO 47 C.F.R. § 76.6(a)(4)

The undersigned signatory has read the foregoing Initial Comments of the Burnsville/Eagan Telecommunications Commission; the City of Minneapolis, Minnesota; the North Metro Telecommunications Commission; the North Suburban Communications Commission; the City of Renton, Washington; and the South Washington County

Telecommunications Commission in Response to the Further Notice of Proposed Rulemaking and to the best of my knowledge, information and belief formed after reasonable inquiry, they are well grounded in fact and arc warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and are not interposed for any improper purpose.

Respectfully submitted,

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April 19,2007

EXHIBIT A

APPROVED BY
CITY COUNCIL
Date 9-8-97

COMMITTEE OF THE WHOLE

COMMITTEE REPORT

SEPTEMBER 8, 1997

TCI FRANCHISE EXTENSION

In August, 1993, the City Council adopted Ordinance No. 4412 which granted to TCI Cablevision a 15-year franchise to operate a cable communication system within the City of Renton. The franchise imposed numerous requirements, one of which was the completion of an upgraded fiber optic cable system throughout the City which wouid expand the number of available television channels to filly-four (54) by September 13, 1997

TCI has requested a 24-month extension to September 13, 1999, to complete the fiber optic rebuild and meet other requirements stipulated in Ordinance No. 4412. In lieu of paying penalties, TCI has agreed to provide the following in-kind considerations tu the City of Renton in exchange for extension of the franchise.

1. Within 24 months. TCI shall provide a separate City-owned fiber optic cable system connecting eighteen City facilities to a hub located at the new Municipal Building.

2. TCI shall remove and reinstall the video equipment and cameras from the old Municipal Building to the Council Chambers in the new location, and evaluate and enhance the existing cahiecnst system tu accommodate current and future needs.

3 TCI shall extend cable service tci the new Municipal Building, both libraries, the Community Center and the new Fire Training Center.

4 TCI shall provide an annual payment to the City to defray the cost of video equipment maintenance.

Recommendation

The Committee of the Whole recommends approval of the proposed agreement with TCI Cablevision outlined above, and recommends that the Mayor and City Clerk be authorized to execute the agreement to extend the franchise requirements.

Kathy Keolker-Wheeler

Council President Kathy Keolker-Wheeler

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Initial Comments of the Burnsville/Eagan Telecommunications Commission; the City of Minneapolis, Minnesota; the North Metro Telecommunications Commission; the North Suburban Communications Commission; the City of Renton, Washington; and the South Washington County Telecommunications Commission in Response to the Further Notice of Proposed Rulemaking to be mailed this 19th day of April, 2007, via overnight or first-class mail, postage prepaid, as indicated below, to the following persons:

Ms. Marlene H. Dortch*
Secretary
Office of the Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, Maryland 20743

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Ms. Holly Saurer**
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Mr. Brendan Murray**
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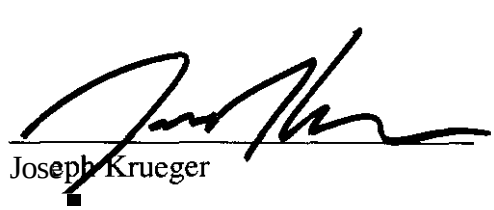

Joseph Krueger

St. Paul, Minnesota
April 19,2007